

BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D. C.

In the matter of

2005/2006 U.S.-CHINA AIR SERVICES
CASE AND DESIGNATIONS

:
:
: OST-2004-19077
:

ANSWER OF AMERICAN AIRLINES, INC.
TO PETITION FOR RECONSIDERATION BY
EVERGREEN INTERNATIONAL AIRLINES, INC.

Communications with respect to this document should be sent to:

HENRY C. JOYNER
Senior Vice President -
Planning
American Airlines, Inc.
P.O. Box 619616, MD 5628
DFW Airport, Texas 75261

MICHAEL C. LENZ
Managing Director -
International Planning
American Airlines, Inc.
P.O. Box 619616, MD 5635
DFW Airport, Texas 75261
(817) 963-2354
(817) 967-3179 (fax)
mike.lenz@aa.com

WILLIAM K. RIS, JR.
Senior Vice President -
Government Affairs
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, D.C. 20036

CARL B. NELSON, JR.
Associate General Counsel
American Airlines, Inc.
1101 17th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 496-5647
(202) 857-4246 (fax)
carl.nelson@aa.com

September 14, 2004

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American Airlines, Inc., pursuant to Order 2004-9-5, September 3, 2004, hereby answers in opposition to the petition for reconsideration submitted on September 10, 2004 by Evergreen International Airlines, Inc.

American also petitioned on September 10, seeking reconsideration and/or clarification with respect to applications, traffic forecasts, confidentiality of traffic data, form of authority, and exhibit exchange. While American's petition should be granted, Evergreen's petition should be denied unless the Department is inclined to decide now, on reconsideration, that the 2006 opportunity should be reserved for a new combination carrier entrant based on compelling public interest factors that are already a matter of public record.

I. THE 2006 PROCEEDING SHOULD NOT BE DEFERRED

Evergreen argues that the proceeding to award the 2006 U.S.-China opportunity should be deferred for nine months, or until June 2005, meaning that the winning entrant would have only a few months to plan for entry. Such a proposal is without merit and should be rejected.

First, the lead time for a new entrant to start service to China requires that awards be made on an expedited basis. The 2005 entrant will have only a few months to complete preparations. There is no sound reason to place the same burden on the 2006 entrant.

Second, a combined 2005/2006 proceeding is far more efficient than two separate proceedings, and will minimize administrative burdens on both the Department and the participating parties.

Third, contrary to Evergreen's argument, the Department has solicited applications for route awards up to 20 months in advance of the effective date for entry, a longer period than the 18 months between applications (September 22, 2004) and 2006 entry (March 25, 2006) at issue here. See, e.g., Notice, U.S.-Colombia Scheduled Combination Service Opportunities, February 16, 2001 (OST-2001-8910), inviting applications for new entry opportunities effective October 1, 2001 and October 1, 2002.

Accordingly, Evergreen's proposal to defer the 2006 proceeding for nearly a year should be denied as contrary to the public interest.

II. THERE SHOULD NOT BE SEPARATE EVIDENTIARY PHASES FOR DECIDING THE ISSUE OF COMBINATION v. ALL-CARGO FOR 2006

Evergreen next argues that the process of selecting the additional U.S. carrier for 2006 should be divided into two separate evidentiary phases, first to decide whether to use the 2006 opportunity for combination or all-cargo service, and then to conduct a separate phase for carrier selection.

The Department should reject this proposal as well. Having two separate evidentiary phases would be burdensome on the applicants and would delay the final decision, to the detriment of the winning applicants in both 2005 and 2006.

If, however, the Department is inclined to determine in advance whether the 2006 opportunity should be assigned to a combination carrier or to an all-cargo carrier, there is a compelling public interest basis for the Department to decide that question now, on reconsideration, and thereby exclude all-cargo applicants from the 2005/2006 proceeding.

Indeed, on September 13, 2004, Gemini Air Cargo, Inc. answered in support of Evergreen's petition for reconsideration, stating that "[t]he Department should first determine whether it will select a combination carrier or a cargo carrier in 2006. The Department can then select from the combination carriers or the cargo carriers that apply for the 2006 designation based upon that decision" (p. 1). Thus, two of the three new entrant all-cargo applicants that have tentatively lost to Polar in the 2004 U.S.-China Cargo and 2004/2005 All-Cargo Frequencies (show-cause Order 2004-9-4, September 3, 2004) are now urging the Department to make an up-front determination on whether the 2006 opportunity should be reserved for a combination applicant or an all-cargo applicant.

Instead of conducting an evidentiary proceeding to determine that issue, as urged by Evergreen, the Department should, on reconsideration, find that the public interest requires designation of a new combination entrant for 2006, and thus limit the 2005/2006 proceeding to combination carrier applicants, based on the following factors.

- o The U.S.-China market is already served by three U.S. all-cargo operators - FedEx, UPS, and Northwest - and a fourth all-cargo opportunity effective August 1, 2004 has been tentatively awarded to Polar Air Cargo by show-cause Order 2004-9-4, September 3, 2004.

o There are presently just two U.S. combination carriers in the U.S.-China market - Northwest and United. A third U.S. combination carrier will be designated for the 2005 opportunity. If the 2006 opportunity were awarded to an all-cargo carrier, there would be five U.S. all-cargo operators v. only three U.S. combination carriers between the U.S. and China market. That imbalance would prevail until 2008, when the next new entrant combination opportunity is available after 2006.

o The last two U.S.-China opportunities prior to 2005 will have been awarded to all-cargo carriers. UPS received authority effective in 2001, and the opportunity for new entry in 2004 - tentatively awarded to Polar - is limited by the Protocol to an all-cargo carrier. In these circumstances, the next two awards - for new entry in 2005 and 2006 - should be made to combination carriers.

o Under the Protocol, the three incumbent all-cargo operators (FedEx, UPS, and Northwest), together with the new all-cargo entrant in 2004, are entitled to a total of 39 additional all-cargo frequencies in 2004 and 2005. Those frequencies were tentatively awarded by show-cause Order 2004-9-4. By contrast, the two incumbent combination carriers (Northwest and United), together with the new combination entrant in 2005, can receive only 21 additional frequencies. Including 2006,

the imbalance in additional U.S. all-cargo frequencies v. additional U.S. combination frequencies is even greater, 51 to 28.¹

- o Combination carriers are able to accommodate both passengers and cargo, while all-cargo carriers can only accommodate cargo. The award of both the 2005 and 2006 opportunities to combination carriers will in itself create substantial additional cargo lift in the U.S.-China market.

- o In addition to the all-cargo scheduled services operated by FedEx, UPS, Northwest, and a fourth all-cargo carrier (tentatively Polar) effective August 1, 2004, the Protocol allows for extensive U.S.-China all-cargo charter services. Under Article 6, U.S. carriers may operate 75 annual one-way charter flights to China Zone 1, 75 to China Zone 2, and unlimited charter flights to China Zone 3. On June 28, 2004, Kalitta Air applied to operate a program of 29 one-way U.S.-China all-cargo charters between August and November 2004, and ample charter opportunities remain for other U.S. all-cargo carriers.

¹Article 2 of the Protocol allows 21 additional all-cargo frequencies effective August 1, 2004, 18 effective March 25, 2005, and 12 effective March 25, 2006 (a total of 51). For combination carriers, Article 2 allows 14 additional frequencies effective August 1, 2004, 7 effective March 25, 2005, and 7 effective March 25, 2006 (a total of 28).

o On July 14, 2004, Southern Air applied for a statement of authorization to operate B747 freighter service under long-term wet-lease to China Cargo Airlines, a PRC all-cargo carrier. This is further evidence of the extent of U.S. all-cargo carrier participation in the U.S.-China market.

In addition to the foregoing facts, there is compelling precedent for the Department to limit the scope of a carrier-selection case for the 2006 award to combination carrier applicants.

When instituting the U.S.-Japan Service Case by Order 89-8-8, August 8, 1989 to select a replacement carrier for Federal Express (as FedEx was then known), the Department decided in advance to limit the scope of the proceeding to combination applicants, even though the award could have been made to a small-package all-cargo applicant under the terms of the 1985 U.S.-Japan MOU.²

²Per the 1985 MOU, the U.S. was entitled to designate up to three new U.S.-Japan combination carriers. but the MOU permitted selection of a small-package carrier for one of the designations. The Department decided in advance to award two of the routes for combination service, and did so by Order 86-10-16, October 15, 1986 (U.S.-Japan Gateways Case) (DFW-Tokyo to American and Portland-Tokyo to Delta). The Department reserved the remaining route for small-package service, awarded to Federal Express by Order 87-12-1, December 2, 1987 (U.S.-Japan Small Package Service), a case restricted to all-cargo applicants. When Federal Express acquired the Flying Tiger Line, the Department's route transfer approval, Order 89-3-31, March 10, 1989, required Federal Express to relinquish its small-package route, resulting in institution of the U.S.-Japan Service Case to reallocate that route to a combination carrier.

In determining to limit the U.S.-Japan Service Case to combination applicants, the Department stressed "the importance of processing this case expeditiously and, to that end, stated our belief that it was desirable to resolve the issue of the type of service that would be certificated on this route at the time that we instituted the case" (p. 2). The Department stated "that it is fully appropriate to resolve the issue of the nature of the service that we will certificate at the time that we institute this proceeding.... [W]e are eager to conduct the process of selecting a successor expeditiously in order to afford the public all of the benefits that derive from the maximum use of our bilateral route authority" (p. 4).

The Department's key finding was that "there would be a greater measure of public benefits to be derived from the expansion of passenger services than from the authorization of an additional small package operation.... The substantial traffic growth in this market over the past several years is also indicative of the need for additional capacity to accommodate passenger demand" (p. 5).

In its application for additional U.S.-China frequencies submitted on June 28, 2004 in OST-2004-18469, United stated that load factors for March-May 2004 on its San Francisco-Shanghai flight averaged 91%, and that "[l]oad factors at these levels demonstrate that demand far exceeds supply" (p. 3).

We also note that the Department, by Order 2004-7-23, July 23, 2004, rejected American's position that the additional 14 U.S.-China combination frequencies effective August 1, 2004 should be placed in issue for new entrant applicants for the 2005 designation. Since the Department decided that matter on public policy grounds and without conducting an evidentiary proceeding, the Department should similarly conclude on reconsideration that the public interest would be best served by limiting the scope of the 2005/2006 proceeding to combination applicants.

But in no event should the Department grant Evergreen's proposal to burden the parties - and delay the final decision - by conducting separate evidentiary phases for the 2006 award.

III. THE PARTIES DO NOT NEED "GUIDANCE" ON HOW EACH CARRIER-SELECTION FACTOR WILL BE "WEIGHTED"

Finally, Evergreen says that the Department "should indicate which decisional criteria it will use in the cases at hand and provide guidance as to how each will be weighted" (p. 6). Such a pre-determination of selection-factor weighting, isolated from the evidentiary record, is plainly without merit.

It is well-established that "[i]n considering competing proposals of applicant carriers in comparative selection cases, it is our policy to weigh the importance of the various carrier selection criteria on a case-by-case basis depending upon the circumstances presented. (See, 51 FR 43180, December 1, 1986.)" (U.S.-Colombia Combination Service Case, show-cause Order 93-7-38, July 26, 1993, p. 17 n. 39. See also, e.g., United Air Lines v. CAB, 371 F.2d 221, 224 (7th Cir. 1967) ("no single factor need be decisive in all cases...given circumstances may weigh heavily in one case but be missing from the scales completely in another").

CONCLUSION

For the foregoing reasons, Evergreen's petition for reconsideration of Order 2004-9-5, submitted on September 10, 2004, should be denied, unless the Department is inclined, on reconsideration, to decide the 2006 combination v. all-cargo question now by excluding all-cargo applicants from the 2005/2006 proceeding. American's petition for reconsideration, also submitted on September 10, should be granted.

Respectfully submitted,

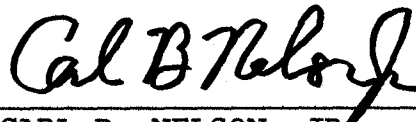
A handwritten signature in black ink, reading "Carl B. Nelson, Jr." in a cursive script.

CARL B. NELSON, JR.
Associate General Counsel
American Airlines, Inc.

September 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by email on all persons named on the attached service list.

A handwritten signature in black ink, reading "Carl B. Nelson, Jr." in a cursive script. The signature is written over a horizontal line.

CARL B. NELSON, JR.

September 14, 2004

Service List

Marshall S. Sinick (Alaska, Aloha, Florida West)	msinick@ssd.com
Brian Hunt (American Trans Air)	brian.hunt@iflyata.com
Ed Faberman (MN Airlines)	epfaberman@uhlraw.com
Jonathan Hill (Hawaiian)	jhill@dlalaw.com
Nathaniel Breed (Pan American)	npbreed@zslaw.com
Gary Garofalo (Air Transport Int'l)	ggarofalo@ggh-airlaw.com
Steve Lachter (ASTAR)	lachter@erols.com
Joanne Young/David Kirstein (North American, America West & World)	jyoung@bakerlaw.com
Aaron Goerlich (Sunworld)	dkirstein@bakerlaw.com
R. Bruce Keiner, Jr. (Continental, Continental Micronesia)	agoerlich@ggh-airlaw.com
Jeffrey Manley (United)	rbkeiner@crowell.com
Megan Rosia (Northwest)	jeffrey.manley@wilmerhale.com
David E. Vaughan (UPS)	megan.rosia@nwa.com
John L. Richardson (Amerijet)	dvaughan@kelleydrye.com
Carl Nelson, Jr. (American, TWA)	jrichardson@johnlrichardson.com
Robert E. Cohn/Sascha Vanderbellen (Delta)	carl.nelson@aa.com
Lorraine Halloway (Air Micronesia)	robert.cohn@shawpittman.com
Howard Kass (US Airways)	Sascha.VanderBellen@shawpittman.com
Robert P. Silverberg (ABX, Kitty Hawk, Midwest)	lhalloway@crowell.com
Kevin Montgomery (Polar)	Howard_Kass@usairways.com
Russ Pommer (Atlas)	rsilverberg@sgbdc.com
Tom Lydon (Evergreen)	kevin.montgomery@polaraircargo.com
Moffett Roller (Gemini)	rpommer@atlasair.com
Mark W. Atwood (Custom Air, Kalitta)	tom.lydon@evergreenaviation.com
Nancy Sparks (Federal Express)	mroller@rollerbauer.com
Stephen Alterman (Northern Air Cargo, Horizon)	matwood@sherblackwell.com
Lawrence Wasko (Arrow)	nssparks@fedex.com
Pierre Murphy (USA 3000)	cargoair@aol.com
Cecilia Bethke (Air Transport Association)	ldwasko@erols.com
Ronald Priddy (National Air Carrier Assn.)	pmurphy@lop Murphy.com
	cbethke@airlines.org
	rpriddy@naca.cc